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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 712

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,

Petitioner,

v.

GORDON CAIRNS,
RHODE ISLAND HOSPITAL TRUST COMPANY, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

PETITION FOR REHEARING

MARTIN MALINOU
334 Smith Street
Providence, Rhode Island
Counsel for Petitioner

Washington, D. C. · [illegible] PRESS · [illegible]

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Petitioner presents his petition for a rehearing of this Court's order dated December 18, 1967, denying the petition for a writ of certiorari to the Supreme Court of Rhode Island, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Twenty-eight days after the Petitioner filed his petition for certiorari, the Rhode Island Supreme Court *sub silentio* changed the law on which it reasoned the judgment sought to be reviewed. This Court has in the past granted a rehearing of its order denying certiorari where an intervening new state case changed applicable state law and made reconsideration by the court which rendered the judgment an appropriate action in light of the new decision. *Conner v. Simler*, 367 U.S. 486.

In *Malinou v. Kiernan*,[1] decided November 7, 1967, 128 days after the Rhode Island Supreme Court rendered the judgment sought to be reviewed, the Rhode Island Supreme Court *sub silentio* changed its interpretation of the phrase "no administration having been granted or proceedings therefor pending" contained in the 1950 Amendment to Section 2 of the Public Administrator Act, R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts 1950, Ch. 2596. The opinion of the Rhode Island Supreme Court delivered upon the rendering of its judgment in *Malinou v. Kiernan* has not yet been officially reported; it is unofficially reported in 235 A.2d 105; and it is printed in Appendix A hereto. (The judgment is contained in the opinion.)

The *sub silentio* change of interpretation has the effect of granting the public administrator standing to be heard in the probate court and to appeal therefrom, regardless of the fact that administration proceedings brought by another party-in-interest are pending at the time of the public administrator's appearance therein. (Under Rhode Island law a party-in-interest is one who has a justiciable interest. *Spooner v. Tucker*, 86 R.I. 266.) The facts of *Malinou v. Kiernan* are

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[1] A petition for a writ of certiorari will be filed in this Court on or before February 5, 1968, seeking review of the judgment rendered by the Rhode Island Supreme Court on November 7, 1967, in *Malinou v. Kiernan.*

that one claimant to the title to the office of public administrator filed a petition for administration d/b/n on the estate of the late Carrie Cumber, after his predecessor in the office of public administrator died without having fully administered the estate. Thereafter, the second claimant to the title (whom the Rhode Island Supreme Court found to be the holder of the title at the time of the filing) filed a similar petition. The Rhode Island Supreme Court, without reference to the early-bird philosophy contained in its opinion delivered upon the rendering of the judgment sought to be reviewed, held that no error inhered in the probate court's grant of administration d/b/n to the second claimant. The court further held that the second claimant did not "resign or forfeit the administratorship" (Appx. A, p. 7) of the estate when he (the second claimant) ceased to be public administrator, but remained the administrator thereof. Speaking of the responsibilities of a public administrator under Section 11 of the Public Administrator Act (which establishes the right of a public administrator to complete the administration of an estate left unfinished by his predecessor in office), the court held that Section 2 of the Public Administrator Act is incorporated in Section 11, stating (Appx. A, p. 3): "The responsibilities of a public administrator to which we refer include that established in sec. 2 of the act, . . .".

With the *sub silentio* change of interpretation in *Malinou v. Kiernan*, the Petitioner's claim of a deprivation of his right to administer the Beazley Estate without Fourteenth Amendment procedural due process, by reason of the Rhode Island Supreme Court's refusal to review the merits of his appeal, becomes crystal clear. The petition for certiorari presents the claim in QUESTION II thereof.

In the event that review in this Court of the Rhode Island Supreme Court's deprivation of the Petitioner's right to administer the Beazley Estate requires the existence of a substantive Fourteenth Amendment "property" right in the grant of administration on the Beazley Estate, of which the

Petitioner claims to be deprived by the refusal of the Rhode Island Supreme Court to review the merits of his appeal, *Malinou v. Kiernan* interprets the Public Administrator Act as granting a public administrator an interest in administering intestate estates which interest extends beyond his term in office. The opinion labels that interest "public policy" (Appx. A, p. 6), expressly rejects the idea that it is a contract right (Appx. A, p. 2) and fails to discuss "property" right. But, it is the Petitioner's contention, since *Malinou v. Kiernan* holds that the right of a public administrator to administer an intestate estate extends beyond his term in office, that the Rhode Island Supreme Court has recognized a "property" right created by the Public Administrator Act, which property vests in the person of the public administrator. Proceeding from the holding that "public policy" extends the right of a public administrator to administer an intestate estate beyond his term in office, the Petitioner points out that "public policy" is a principle of law, and Petitioner calls the Court's attention to the philosopher Bentham who recognized this truth that property is a jural concept existing by virtue of law: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." Bentham, *The Theory of Legislation* 111-13 (London ed. 1931). The term "property" within the meaning of the Fourteenth Amendment, therefore, refers to those interests or claims possessed by private parties and recognized and protected by law. Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B. U. L. Rev. 435, 439 (1964).

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the Supreme Court of Rhode Island.

MARTIN MALINOU
334 Smith Street
Providence, Rhode Island
Counsel for Petitioner

DATED: January, 1968

CERTIFICATE OF COUNSEL

I, MARTIN MALINOU, counsel for the Petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

Martin Malinou